

FINAL STATEMENT OF REASONS (FSOR)

This Final Statement of Reasons (FSOR) has been prepared by the Office of Small Business and DVBE Services (OSDS), Procurement Division, Department of General Services as part of the DVBE making process. It follows upon the Initial Statement of Reasons (ISOR) dated February 13, 2018 (incorporated by reference) specific to the regulatory adoption published in the California Regulatory Notice Register on March 16, 2018 (Register 2018, No. 11-Z, pages 433-436). A mandatory initial 45-day public comment period commenced March 16, and closed April 30, 2018. A further 15-day comment period on the proposed changes took place between September 10 and September 25, as set forth in a "Notice of Change to Text as Originally Proposed," dated September 10, 2018 (incorporated by reference).

During these periods, four commentators submitted five discrete comments to DGS and while all five were considered, none were sufficient or compelling enough to justify changing or adding to the regulatory content as originally posed and published. Two comments were not specifically directed at the proposed action or to the procedures followed in proposing or adopting the action under consideration, and are accordingly deemed "irrelevant" per Government Code (GC) 11346.9(3). In accordance with latitude permitted under GC 11346.8(c)(1) for non-substantial and grammatical adjustments, separately self-initiated corrections have been additionally incorporated into the final rulemaking text. No one noted or remarked upon these particular textual inconsistencies during the 45-day public comment period. Furthermore, no one submitted comments or statements during the 15-day extension of public comment.

Post March 16 Notice Modifications or Addenda to the ISOR:

Post-notice clarifications, modifications or additions to information contained in the Initial Notice or ISOR (incorporated by reference) are as follows:

- No new technical, theoretical or empirical material or document has been additionally relied upon or should have been made available for public review prior to the close of the public comment period. Anticipated fiscal impacts remain negligible, as already documented.
- The initial determination contained in the published Notice of Proposed Rulemaking (page 435) regarding whether the regulations impose a mandate upon local agencies/school districts is unchanged: There is no such mandate imposition.
- Further statements as to the necessity and purpose of the proposed adoptions, amendments and rule repeals have been set forth in the ISOR addendum dated September 7, 2018 (incorporated by reference), noticed to the public on September 10, 2018.
- Non-duplication: ISOR pages 9, 10, 11, 12, 15, 18, 24, 26, 29, 31, 32 and 33 provide justifications, explanations or reasons for exceptions to or overlap with statutes or other regulations despite "serving the same purpose" of those other statutes or rules. Furthermore, the proposed duplication or overlap cited as "authority" or "reference" for the proposed regulation are necessary to satisfy the "clarity" standard of GC 11349.1(a)(3).

Public Comment Overview:

Solicitation for public comment, in addition to publication in the Regulatory Notice Register, entailed a public hearing on Monday April 30th, internet posting, direct electronic notification of more than 17,712 certified firms, 1,911 broadcast subscribers and contracting agents, 240 Advisory Council members and DVBE Advocates, and public counter availability. An additional 15-day public comment period was announced to the same audience, including those who had previously commented, ending September 25. Preceding public comment were several informal opportunities that afforded certain stakeholders a preview the proposed changes. Finally, in accordance with the provisions of Military and Veterans Code (MVC) 999.5(a), DGS closely coordinated with the Department of Veteran Affairs (CalVet) Program Advocate in the development and adoption of these rules, including appearing before the CalVet DVBE advisory body for the purpose of reporting on the progress of adoption.

Summary of and Responses to Comments Received during the Initial 45-day period:

For purposes of tracking accommodated or declined suggestions, each submitted comment has been assigned identifier initials and indexed (separately attached) for final rulemaking purposes. However, as an alternative to listing commenters alphabetically, an accommodation/revision sequence by relevance is used, as follows: (1) Comments not directed at or irrelevant to the rulemaking action, (2) Substantive, sufficiently related comments considered, and (3) Self-identified non-substantive changes in the text initially made available to the public.

Comments not directed at or irrelevant to the proposed action or adoption procedures:

Comment: Richey - Accurate Striping (3/16/2018):

It doesn't make any difference. You have the California State Contractor's code [which] none of the agencies respect or obey.

RESPONSE: Any instance of an awarding department's failure to comply with contracting licensing codes can be reported to various authorities other than OSDS.

Complaints against contractors are filed with the California Contractors State License Board (CSLB) by homeowners, other contractors, subcontractors and employees. Complaints within the board's jurisdiction involve failure of a licensed contractor to fulfill the terms of an agreement. Failures include poor workmanship; abandonment of a project; failure to pay subcontractors, material suppliers or employees; or building code violations. Other failures are lack of reasonable diligence in executing a construction project; use of false, misleading, or deceptive advertising; home improvement contract violations; etc. Additionally, should the failure to "respect or obey" contracting rules originate with entities other than the contractor, the Chief Executive of the agency in question or the Department of Consumer Affairs, California Attorney General and/or California State Auditor are those to whom complaints should be directed.

However, inasmuch as this particular objection is not specific to OSDS's proposed action or adoption procedures, the comment is categorized "irrelevant" under Administrative Procedure Act criteria. No accommodation required, and moreover, the concerns expressed can be rectified through other means.

Comment: Payne Pest Management (4/13/2018):

Please see attached proposal for your review and let me know what you think.

RESPONSE: Message did not have an attachment, and the email appears to have been misdirected. Therefore, the comment is “irrelevant,” under APA criteria.

Substantive, sufficiently related comments considered but not initially accepted and/or declined for reasons provided:

Comment Construction Management Services (CMS), Inc. (Aguilar 3/18/2018):

DVBE program is wonderful. However, I read nothing about how the principles are supposed to treat the DVBE. Nothing about fines or penalties regarding the misuse of DVBE's. It would be nice to know there was more than a program for the Vets.

RESPONSE: The comment asking about how “principles are supposed to treat the DVBE” cannot be accommodated due to an absence of rule specificity. DGS and other awarding departments have adopted protocols and standards which are compulsory with respect to numerous aspects of practices directly and indirectly affecting principles. The State Contracting Manual (SCM) repeatedly mentioned in the ISOR is one place where such matters are spelled out. The SCM is accessible on line from a variety of sources, including the following web address: <http://www.dgs.ca.gov/ols/Resources/StateContractManual.aspx>

With respect to fines or penalties; existing rule 2 CCR 1896.88 has been revised to more accurately reflect the provisions of MVC 999.9 whereby enumerated actions taken which knowingly, willfully or with intent to defraud the DVBE program (i.e. “DVBE misuse”) are explicitly identified as unlawful. That fines and penalties regarding unlawful DVBE misuse can be imposed are set forth in 1896.90, the immediately following rule. The amount of fines, penalties or imposition of other sanctions are, in general, case-specific and subject to the due process and appeal provisions of the Enforcement and Sanctions and the Appeals provisions of the remainder of the Subchapter. The rule provisions are explained on ISOR page 31.

Nevertheless, MVC 999.9(b) sets forth the following baseline for fines: “Any person who violates any of the[se] provisions [...] shall be guilty of a misdemeanor punishable by imprisonment in the county jail not exceeding six months or by a fine not exceeding one thousand dollars (\$1,000), or by both. In addition, the person shall be liable for a civil penalty of not less than ten thousand dollars (\$10,000) nor more than thirty thousand dollars (\$30,000) for the first violation and a civil penalty of not less than thirty thousand dollars (\$30,000) nor more than fifty thousand dollars (\$50,000) for each additional or subsequent violation.” Additionally, defendants are liable for costs and attorney fees. In the interest of preventing indiscriminate incorporation of statutory language in a regulation and in recognition that the provisions of MVC 999.9(b) are already readily enforceable and understandable in the original, it is OSDS's contention that duplication or overlap of the referenced statute as a rule is not necessitated by the need to satisfy the APA clarity standard. Therefore, no further accommodation is required.

Finally, with respect to the desire to “know there was more than a program for the Vets,” ISOR page 1 and the Notice of Proposed Action of Regulations do make reference to the

fact that OSDS also administers a program for small businesses certification. Also, California state government provides a great variety of programs for citizens beyond those for vets, but these are matters far beyond the scope of this particular rulemaking action, and as a consequence no comment accommodation is possible in this instance as well.

Section 1896.80. Application & subdivision (d) of Section 1896.84, Recertification

Comment South Coast Steel Service, Inc. SCS #1 (Ramirez):

Do we have to provide three years of Corporate tax returns and four quarters of payroll tax returns just to renew or is this for “new” applicants only?

RESPONSE: Payroll documentation is relevant only in the case of DVBE dual certification as a Small Business and would be necessary in order to demonstrate eligibility and obtain such recertification. Submission of all supporting documentation, including tax returns is required by rule 1896.84(d) for recertification. This information is prompted both when applying electronically, on the Cal eProcure portal, and on page 6 (Support Document Requirements for Small Business) of the hard-copy Request for Small Business & DVBE Certification (Rev. 11/4/2016) per rule 1896.80. As ISOR page 28 explains, 1896.84(d)(2) now allows OSDS the latitude to tailor recertification submissions if what’s already on file (such as prior year income tax returns) is sufficient for the purposes of confirming eligibility. Consequently, in the instance that the commenter mentions, it may only be necessary to provide that particular tax return (or returns) of the past three years not already on file with OSDS.

As the cited rules are already sufficient to the questions posed, no further accommodation is necessitated.

Section 1896.80. Application & Section 1896.82. Responsibilities of the DVBE Applicant

Comment SCS #2 (Ramirez)

If we do have to submit all renewal information, can I mail it? I do not feel it’s safe to put our employees’ SS numbers online.

RESPONSE: As ISOR page 20 explains, a hard-copy application version which can be submitted only by mail (or in person) is allowed in accordance with rule 1896.80. Therefore, mailing documentation in support of a certification request deemed too sensitive for digital transmission is already permitted by these rules. No further accommodation is necessitated.

Non-substantive and/or grammatical correction:

Self-identified Correction of Typographic Mistakes:

Sections 1896.60(n); 1896.70(a), 1896.72(b); and 1896.77 note.

RESPONSE: In addition, excess verbiage inadvertently included in the text released for public comment in sections 1896.60(n); 1896.70(a) and 1896.72(b) has been edited out without changing the meaning of the rule in question. These page 4, 7 and 11 deletions are necessary in order to remove content never intended to be incorporated within the rules identified. Finally, a page 18-19 reference note adjustment corrects for an incomplete citation. In accordance with the latitude permitted under GC 11346.8(c)(1) for

non-substantial and grammatical adjustments, the final regulatory text submitted for adoption reflects the correction of these and even less notable formatting errors such as absent commas and incorrect authority and reference note formatting, without conducting further public review.

Text Formatting and other Substantive and Non-Substantive Adjustments: Formatting errors, word order difficulties or inadvertent omission of existing superseded text has been corrected throughout the re-notice text and all are considered non-substantive changes without regulatory effect.

Authority and Reference Citations: Per publisher practice and formatting convention, previously indicated statutory subdivisions, commas falling before “and” or comma omissions in the authority and reference note citations, have been removed (or added, as needed) throughout the re-notice text, also without regulatory effect.

Other adjustments in original ISOR content with respect to text changes, as explained in the September 10 Notice:

§1896.83(a) The proposed rule amendment already described on ISOR page 26 is being further adjusted. The revised rule verbiage appears in three places. The first is found in the lead-in which states that certification will be denied, when (a) through (c) applies. Added will be a subordinate clause specifying that such denials are subject to the due process provisions of the appeals section of these rules. While the cited rule already specifically indicates that certification denials can be appealed, repetition is intended for additional clarity and to alleviate concern that this due process safeguard is not fully understood. The remaining additions are “within the 30 calendar days” and “in a written notice from OSDS.” This is substantially the requirement already set forth in existing rule 1896.84(e) whereby responses to certification notices are required within “30 calendar days” to avoid certification denial. In the process of repositioning this existing provision from 1896.84(e) to the new location of 1896.83(a), omission of the 30-day requirement was inadvertent. Additionally, the wording now being adopted in all three instances constitutes a clarity improvement. Finally, continuation of the 30-day response requirement is justified on the basis of program judgment that this number of days is appropriate based on the need for timely information and program efficiency, balanced against the burden this represents upon applicants.

§1896.84(e): The proposed rule amendment already described on ISOR page 28 is being further adjusted. “Thirty (30) days after written notice” is being added to the subdivision, which is itself a rule relocated from existing 1896.82(j). This language continues the existing rule provision with respect to DVBE withdrawal from certification when eligibility requirements are no longer met. The rule is necessitated by the fact that certified firms are known to assume that certification is in perpetuity, despite no longer satisfying the legal and regulatory requirements due to ownership, residency or similar business changes. With respect to keeping OSDS informed of changed circumstances, these provisions are to place a reasonable burden of responsibility on certified entities. The 30-day response requirement is based on program experience. It is the number of days

appropriate based on the need for timely information and program efficiency, balanced against the burden this might represent to those affected.

Subdivisions (g)(1) and (2) of § 1896.84: Subsequent to the creation and release of the proposed text dated 02/13/2018, errors were noted on page 36 that to some could be considered a substantive adjustment. The subdivision (g)(1) text should have had the word “thirty” preceding the number 30 inside parenthesis, instead of “sixty.” Subdivision (g)(2) text should have had the word “ninety” preceding the number 90 inside parenthesis, instead of the word “sixty.” Despite these inadvertent errors, ISOR page 29 is correct in its description and explanation of both of these time frames.

§1896.91(c): The proposed rule amendment already described on ISOR page 28 is being further adjusted with addition of the words “for good cause.” The amendment substitutes for deletion of the words “justification for the” from the existing rule 1896.91(d) provisions moved forward to subdivision (c). The repositioning constitutes an improved, streamlined substitution for the existing (d) verbiage which is being discontinued because it is replete with unrealistically complex instructions and requirements awarding departments typically ignored. This is the “needlessly limiting and purely operational content being eliminated entirely,” referred to on ISOR page 33 (top of page bullets).

Alternatives Determination:

The Department finds, as GC 11346.5(a)(10) requires be stated, that no reasonable alternative considered by the agency, including those posed during GC 11346(b) and GC 11346.45(a) opportunities, were more effective in carrying out the purpose for which the regulation was proposed, would have been as effective and less burdensome to affected private persons than the adopted regulation, or would have been more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. There were no comments submitted in the course of public comment, the adoption of which would have lessened any adverse economic impact on small businesses. All other requirements of GC 11346.9 have been satisfied in the content of the Notice of Proposed Action on Regulations published in the California Regulatory Notice Register on March 16, 2018, incorporated by reference.